FOR THE DEFENSE

The Newsletter for the
Maricopa County Public Defender's Office

Volume 1, Issue 4 -- July, 1991

Dean W. Trebesch,
Maricopa County Public Defender

Contents:

A MATTER OF INTERPRETATION. . .

By Anita Rosenthal

An area often overlooked by defense attorneys is Spanish-speaking clients' statements made to police officers. There are two issues which frequently present possible challenges. First, the issue of Miranda rights being properly given in Spanish and whether there was an intelligent, knowing and voluntary waiver of those rights. The second issue is the ability of the police officer to accurately question and interpret what the defendant has told the officer.

The first issue is a relatively simple one: was the defendant properly advised of his or her rights, and was there a proper waiver of those rights? The first inquiry must begin with the Miranda rights themselves. Although most law enforcement agencies have "Rights Cards" printed in Spanish which the officers carry with them, they are often poor translations. One card from the Chandler Police Department advised defendants that they had the right to "not make any noise" and the right to have a "question mark" appointed by the court.

When interviewing the police officer, have the officer recite in Spanish exactly what he or she told the defendant his rights were. If you cannot have a court interpreter present at this interview, tape record it and you can present the recording to a court interpreter at a later time.

Assuming the Rights Card is properly translated, the second inquiry is whether the officer correctly read it to the defendant. It is amazing how often "Spanish-speaking" officers botch up the words when reading off the card. To make matters worse, the officer will often attempt to supplement the Rights Card with his or her own version of those rights. The result is often that the defendant is advised of meaningless nonsense.

The third inquiry is whether the defendant made a knowing, intelligent and voluntary waiver of these rights. Of course, there can be no knowing and intelligent waiver if the rights were not properly communicated to the defendant. Miranda v. Arizona, 384 U.S. 436 (1966). Whether there has been a valid waiver depends on the totality of the circumstances including the background experience and conduct of defendant. North Carolina v. Butler, 441 U.S. 369 (1979). Any language difficulties encountered by the defendant are considered in determining whether there has been a valid waiver. United States v. Bernard, 795 F.2d 749 (9th Cir. 1986); United States v. Martinez, 588 F.2d 1227, 1235 (9th Cir. 1978).

The second issue is more difficult and complicated. It is the ability of the officer to fairly relate what he or she asked the defendant and accurately interpret the defendant's responses to the questions. It is basically a foundation objection to the State's presentation of this testimony.

Interestingly, every time I have raised this issue I have been surprised by the poor quality of the officer's language skills, despite his claim of fluency in Spanish. If it becomes apparent during the interview of the officer that his or her language skills are less than adequate, this can be brought to the judge's attention through a hearing where the court interpreter is present to both advise you and testify as to the officer's Spanish-speaking ability.

(cont. on pg. 2)

Even if the judge allows the statements to come in at trial, you can still present this issue to the jury if you believe the officer was incorrect in his or her interpretation of your client's statements. For example, I recently was involved in a jury trial where the issue was whether my client knew the car he was driving was stolen. The Mesa Police Department detective was called by the State to testify as to the defendant's incriminating statements made at the station. The officer testified that he grew up speaking Spanish and was fluent in both languages. However, when asked on the stand to say certain phrases in Spanish, he could not. It became clear to the jury and everyone else in the courtroom that the officer was not fluent in Spanish and that he could very easily have been mistaken as to the exact words my client spoke.

Don't be intimidated by the officer's claim of fluency in Spanish. Don't assume that the officer speaks Spanish simply because he or she says he does. It is very difficult to accurately interpret and that is why the Court Interpreter's Office has such stringent requirements as to who can be a court interpreter and who cannot. It is not enough to just simply be able to speak a language. The Spanish language varies tremendously depending on the country or region that the defendant is from and therefore idioms and cultural expressions vary widely. The Court Interpreter's Office is aware of these issues and is available to help you in these areas. ^

ONE FOR THE ROAD

By Gary Kula

FELONY DUI: SUSPENDED LICENSES

If your client is arrested for DUI while his license is suspended, canceled, revoked or refused (SCRR), A.R.S. 28-692.02(A)(1) provides for the enhancement of the offense to a felony. In evaluating and defending these cases, consider the following issues:

A. The statute may not encompass those persons who have never applied for a driver's license.

If you look at the old DUI statutes back in the 1970's and 80's, you'll see that the statutes contained explicit wording including those persons who had never applied for a driver's license. The current felony statute has deleted any reference to this. This deletion is consistent with the O'Hara (674 P.2d 310) decision back in 1983, where the Supreme Court recognized that there is a distinction between those who have never applied for a license and those who drive in defiance of MVD orders.

The States typical response to this argument is that the term "license", as used in the statute, merely refers to driving privileges. This position is without merit as the statute (28-602) itself fails to define license in terms of a "privilege".

B. If there is a stipulation as to SCRR, it should not be read to the jury.

While there are some limited situations where it may be strategically necessary to inform the jury of this stipulation, the general rule is that it should not be disclosed to the jury. Just as a motion to bifurcate should be filed in every case where there is an issue as to the status of a client's driving privileges, defense counsel should press the position that it is clearly improper for the jury to consider the issues of DUI and SCRR at the same time. This position is supported by Rule 403, the argument that the status of a person's license is a "punishment enhancer" and not an element of the offense, and the reasoning used by the courts in Udall (717 P.2d 878 (1986)), Collins (778 P.2d 1288 (App. 1989)) and Leonard (725 P.2d 493 (App. 1986). These arguments and cases should also be used in support of a motion in limine to bifurcate the trial on the issues of DUI and SCRR.

C. The felony offense of DUI with license SCRR may not apply to offenses occurring on private property.

A DUI offense can occur anywhere within the state. Unlike DUIs, it is not against the law for a person with license SCRR to drive on private property. The statutory prohibition against driving while license SCRR is strictly limited to driving on public highways (see 28-473). Given the differences in these statutes, there is an issue as to whether a DUI can properly be enhanced to a felony when the driving occurs solely on private property. If the law allows a person with license SCRR to legally drive on private property, the State should not be allowed to use this otherwise lawful conduct to elevate a misdemeanor offense into a felony.

D. The evidence at trial must establish that our client knew or should have known his license was SCRR.

(cont. on pg. 3)

FOR THE DEFENSE

Editor: Christopher Johns, Training Director
Assistant Editors: Georgia A. Bohm and Teresa Campbell
Appellate Review Editor: Robert W. Doyle

Office: (602) 495-8200
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004

FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean W. Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

If the requirements of the Title 28 notice statutes (28-446, 453, 692.02(C)) are met, the State is entitled to a presumption of notice. These notice statutes do not make DUI with license SCRR a strict liability offense. The leading cases of Johnston (731 P.2d 638 (App. 1987)) and Jennings (722 P.2d 258 (Ariz. 1986)) clearly state that the prosecution must prove that our client knew or should have known that his license was SCRR. The notice statutes merely give rise to a presumption. This presumption can be rebutted with defense evidence that our client lacked the requisite culpable mental state because notice of SCRR was never received.

NOTES:

1) The Hinson issue was recently argued before the Supreme Court. If you have any cases with a Hinson issue, you may want to file the motion as soon as possible just in case. . .

2) Just a reminder that Campa (application of 13-604 to Title 28 felony DUI offenses) has been overruled. The companion case of Albrecht has held that any felony conviction can be used to enhance the punishment of a Title 28 felony offense.

3) We are in the process of compiling a new DUI information and motion book for distribution at an in-house update briefing to be held in the near future. Please send me any materials or motions you wish to contribute. ^

INVESTIGATIONS & MISTAKEN IDENTITY: USING FINGERPRINTS

By David C. Moller, Sr. & F. Duane Avey

The 24 investigators, polygraph examiner, two process servers and an aide that comprise our investigations unit play an essential role for our clients. Their role extends from pretrial preparation to use at sentencing.

Investigators are fact finders for our clients. Most are former police officers that have many years of experience and considerable knowledge about crime investigation. Effective representation for most cases that go to trial and for many sentencings require the use of an investigator to obtain information for our clients.

While several of the investigators have special training and knowledge, David C. Moller, Sr., Lead Investigator for Trial Group C, is also a fingerprint expert. His expertise has been invaluable in many cases since coming to our office.

In the last three years Dave has handled nine "fingerprint cases" where fingerprint analysis helped our clients. In 5 of those cases our client should never have been arrested. In the other 4 cases our clients were charged with another person's offense, as well as their own. The fact is that the wrong people do get arrested and it probably happens more often than it should. The following summarizes cases in which our clients should not have been arrested or were wrongfully charged:

State v. Coker -- Over a period of several years the Coker brothers used each other's name when arrested. The defendant was arrested by Chandler Police Department and charges were filed based upon his brother's theft warrant. It required fingerprint analysis to prove they had the wrong person on this charge.

State v. Delgado-Otero -- It was during the police investigation that police confused a name heard on a phone tap recording with the defendant's name. In fact, it was a conversation with the defendant's nephew. This mistake was passed on to the Grand Jury, who indicted the defendant using the nephew's name as an AKA. The defendant was arrested and accused of sale of narcotic drugs. Both sets of fingerprints were obtained, analyzed and the results presented to the County Attorney. The charges were dismissed and the defendant released once our office demonstrated our client's innocence.

State v. Chavez -- The defendant was arrested for theft. The jail booked him under his brother's name, even after the defendant protested and tried to correct the booking record. The Probation Department moved to have the brother's probation revoked due to the arrest. The defendant could not be released on bail because of the probation hold. The defendant's prints were analyzed which revealed that the defendant was not on probation, but rather his brother was. The probation revocation hearing was dismissed and the defendant became bail eligible.

State v. Greer -- The defendant used a friend's name in prior prostitution arrests. Numerous records reflected the friend's name as an AKA. The defendant was arrested for a new offense, and then additional charges were filed against her, which were, in fact, criminal damage charges of her friend. The defendant was held in jail, without bail, due to the additional charges.

Fingerprints of both women were presented in court, revealing the mistake. The County Attorney, based upon the investigation, dismissed the criminal damage charges. Bail was then available to the defendant.

State v. Valenzuela -- The defendant was arrested for possession of narcotics and when booked used an alias. The alias almost matched the name of an individual wanted for similar charges, who had been arrested and released several months prior to this arrest. The defendant was charged with the other offense as well based on the similar name. Prints were obtained of both arrests, which did not match. The County Attorney then dismissed the charges that were based on the similar name.

State v. Rivera -- The defendant was arrested on a theft warrant which listed his name and date of birth. The defendant stated that it was not him and told his attorney that he had lost his wallet approximately one year earlier. To correct the mistaken arrest, prints were obtained from the defendant, and compared to the original arrest files for the theft. They did not match. The defendant was released after a hearing.

(cont. on pg. 4)

State v. Hernandez -- The defendant, a legal Mexican resident, was stopped going across the U.S. border where he regularly crossed with a valid work permit. The defendant did not speak English and worked in the U.S. to send money to his family in Mexico.

A computer check revealed a child molest warrant for an individual with a similar name and date of birth. The defendant was arrested and remained in jail awaiting a transfer for approximately one month.

Our office printed the defendant and provided the prints to the County Attorney and police detective. The prints were clearly different.

The detective, however, said he did not "believe in fingerprints" and took a photograph of the defendant to the victim for identification. The victim verified to the police and to the County Attorney that they were prosecuting the wrong person. The defendant's warrant was dismissed.

Unfortunately, the defendant was now unable to be released due to an immigration deportation hold which was filed as a result of the child molest arrest. He was held approximately one more week before the immigration matters could be cleared up.

State v. Pyle -- The defendant's brother used the defendant's name for several traffic tickets, arrests for misdemeanor DUI and drug charges. The brother failed to appear on these charges. The defendant later was arrested on a warrant, made bail and was given a court appearance date. During the court hearing, both brothers' prints were presented and the charges were dropped.

State v. Sanchez -- The defendant is named Martin Sanchez and has a twin brother named Martinez Sanchez. When arrested and interrogated, the police refused to believe the defendant was not the individual named in a warrant. (Physical features listed that the brother was missing an eye! A significant distinguishing feature?) Both sets of prints were obtained and during a court hearing the defendant was released after being incarcerated approximately one week. Martin Sanchez had done nothing wrong.

In many of the above cases, the defendant contributed to the problem by using the wrong name, or had previously used an AKA in an arrest. Unfortunately, some were arrested because the police failed to conduct a complete investigation prior to the arrest. What is most disturbing is that in each of these cases there was very little concern to correct the problem outside of our office.

What to do if you are faced with a client who claims he is not the person named in the charges? Obtain all police reports available, subpoena all booking photos, arrest records and fingerprint cards from the arresting police department and request an investigator. The investigator will work with Dave to compare the fingerprints for you and hopefully exonerate our client. ^

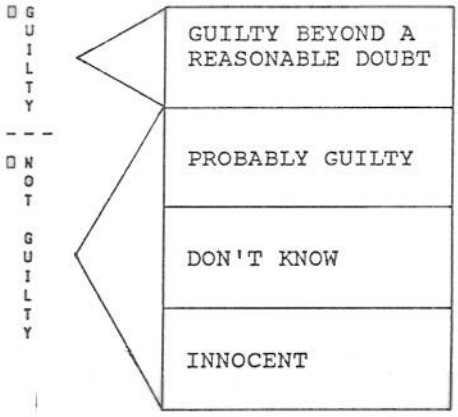
CLOSING ARGUMENT: SEEING IS BELIEVING

By Michael Walz

Studies prove that a significant percentage of people use vision as their primary means of receiving information for mental processing. Use of visual aids is often recommended as a means to assist the jury in understanding a witness's testimony during closing argument. Attorneys often struggle at great length to impress upon the jury the high standard of proof necessary to convict a citizen. Can a visual aid be of assistance?

Some years back I devised a visual aid which dozens of jurors and defense lawyers have credited with greatly contributing to "not guilty" verdicts. It employs the dynamics of a small group dealing with the legal requirement of a unanimous conclusion of guilt beyond a reasonable doubt. A fundamental principle of the psychology of small group is that they tend to compromise with each other to reach a consensus. Arriving at a consensus is greatly aided by the jury instruction of unanimity.

Begin by conceding that reaching a verdict may be a very difficult task. Tell them the following chart may give them some assistance.



Tell the jury that this chart reflects the law in the United States as to criminal cases. The prosecutor will agree. Admit to them that the chart appears to favor the accused in a criminal case. In a civil case, as opposed to a criminal case, it would look different. It would be split down the middle. In a civil case we are talking about money. But in a criminal case we are dealing with something, in the United States, we hold more precious than money -- liberty. That is the reason for the requirement of proof beyond a reasonable doubt. We have a repugnance towards convicting innocent people. The law exists as it does to protect innocent people from being convicted when the jury is just not certain.

(cont. on pg. 5)

During jury deliberations each juror will believe that there is an appropriate place for him or her on the chart. Where they place themselves is their decision alone. Defense counsel must trust that the jury will take its responsibility seriously. Recall to the jury's attention the judge's instruction that they must presume your client innocent. Therefore each one of them must begin the process by placing themselves at the very bottom of the chart. Concede they may end up at very different places on the chart. Although they all heard the same evidence, the law permits them to view the evidence and assess the credibility of the witnesses as they see fit. Indeed, it is rare to find two individuals who hold identical views -- much less eight (or twelve). But there is a reason why we have more than one person deciding a criminal case. Our experience as a nation teaches us that the more different views expressed, the more likely we will reach the best decision. Each juror will have to place himself somewhere on the chart. Defense counsel asks that as you sit around the table in the jury room, each person be given a full and fair opportunity to express his or her opinions and ideas. Now after this full and frank discussion only if all eight jurors place themselves at the top of the chart does the law permit them to find the client guilty.

"Ladies and gentlemen now let's talk about the evidence . . ." At this point you bring out the pieces of evidence of guilt and admit that each one of them may cause the jurors to move themselves up the chart. Tell the jurors exactly how far is up to them. The magic of the chart is that even if they go to the very top of the chart, you can then talk about evidence consistent with innocence to move them back down. Again, how far is up to them.

The theory is that jurors will place themselves at different points on the chart. Group dynamics kicks in and eliminates the extremes at both ends. This will most likely result in the consensus of "probably guilty" or possibly "don't know". You win.

Your close, using this chart, should be constructed and delivered to facilitate compromise. The tone is soft-sell, but you should argue innocence with sincerity. The jury need not believe what you are selling in order for you to prevail. ^

COUNSEL AT EVERY STEP

Since the reality is that almost 97% of our clients plead guilty or no contest, sentencing provides the major opportunity for defense counsel to reveal to the court our client's background.

Obviously, knowing the sentencing rules and factual details is important. However, just as important is knowing the sentencing judge and probation officer, and intervening early to shape the best possible sentence for our clients. Knowing your client's background and history cannot be overemphasized.

Obtaining records, advising the client how to address the court, clearing up other matters (such as warrants), getting the client into a self-help program and requesting mitigation evidence, are all a regular part of defense counsel's duties for sentencing. However, one of the overlooked aspects of sentencing is attending the presentence interview.

Like us, probation officers have high caseloads. Hence, providing them with any information that verifies the clients history, e.g., employment record, is usually welcomed. In some cases you may also want to go with your client to the interview with the presentence writer. While this cannot be done on every case, occasional special circumstances warrant the investment of time for the client. There are several good reasons for attending.

Judges, also due to increasing caseloads, rely more and more heavily upon the presentence writer's conclusions. Since information provided to the court may be the basis for a more harsh sentence, it is defense counsel's duty to insure the information is correct. Often our clients are not capable of correcting this information themselves and as the Supreme Court noted over 60 years ago in Powell v. Alabama, the defendant "requires the guiding hand of counsel at every step in the proceedings against him".

Particularly in drug and sex cases, the presentence interview may pose other risks for the uncounseled client. For instance, in determining what sentence to impose, the sentencing court may consider alleged criminal conduct for which the defendant has not been convicted. The presentence writer may obtain uncounseled and inculpatory information that may unnecessarily increase the client's sentence.

There are also cases where the education level and/or some other disability may prevent the client from effectively communicating with the presentence writer. These circumstances also should be taken into consideration in determining whether to attend the interview.

For example, a recent federal case dealt with a situation where the client made inculpatory statements significantly enhancing his sentence. The Sixth Circuit in United States v. Davis, 919 F.2d 1181 (1990), noted that had the attorney questioned the client's ability to give reliable answers to the presentence writer, he probably would have chosen to attend the interview.

In the presentence interview, the client admitted to possessing more cocaine than the government could have proven. The court noted that it was troubled by the attorney's decision not to attend. And, further noted that in a civil case the attorney would not have allowed his client to be deposed without his presence.

Unfortunately, caseloads sometimes prevent us from giving our clients all of the representation they need. There are alternatives. The client, if out-of-custody, can be asked to bring the presentence questionnaire to your office to discuss it before filling it out. If the client has the means, ask him to send you a copy of the questionnaire if he cannot meet with you or you cannot attend the interview. At least then you can be alerted to potential problems. If the client is in-custody, simply go over a blank questionnaire with him before the presentence writer does the interview.

The presentence report ends up following the client for life. It affects his present sentence, classification in DOC and, if new offenses occur, the type of plea agreement he may receive in the future. CJ ^

ARIZONA ADVANCED REPORTS
Volume 87

State v. Superior Court
87 Ariz. Adv. Rep. 8, May 21, 1991 (S.Ct.)

Defendant is charged by direct complaint with murder and moves to waive his preliminary hearing. The state objects and the prosecutor refuses to sign the waiver form [See Form X in the Rules of Criminal Procedure]. The commissioner grants the waiver. A defendant may not waive a preliminary hearing over the state's objection. To be effective, the waiver must be signed by the defendant, his counsel and the prosecutor.

State v. Gendron
87 Ariz. Adv. Rep. 10, May 23, 1991 (S.Ct.)

Defendant is charged with unlawful flight from a law enforcement vehicle, aggravated assault and criminal damage. Defendant requested a justification instruction on the unlawful flight charge, which was properly denied. It was also not fundamental error to refuse justification instructions on the aggravated assault and criminal damage counts. Fundamental error must be clear, egregious and curable only by a new trial. Defendant specifically disclaimed reliance on a justification defense at trial on these charges. No fundamental error occurred.

State v. Houpt
87 Ariz. Adv. Rep. 59, May 23, 1991 (Div. 2)

Police at the airport receive information that a defendant just checked-in an unusually heavy suitcase. The police approach the defendant, inquire about the suitcase and arrest him. The police then bring in a narcotics detection dog. The dog alerts when it examines the suitcase. A search of the suitcase pursuant to a warrant shows 26 pounds of marijuana. The court holds that there was no reasonable suspicion to arrest the defendant before the dog alerted to the suitcase. However, reasonable suspicion is not necessary before using a narcotics detection dog or any other technique to examine a suitcase so long as the examination does not meaningfully interfere with a defendant's possessory interest. The detection of marijuana in the defendant's suitcase was wholly independent of the illegal stop of the defendant in the airport concourse. Suppression of the marijuana is reversed.

State v. O'Guin
87 Ariz. Adv. Rep. 54, May 21, 1991 (Div. 2)

Defendant plead guilty to assault and was ordered to pay nearly $700 to the Judicial Collection Enhancement Fund. The fine was to be paid in monthly installments based upon the defendant's ability to pay as determined by the probation officer. The fine is set aside and the case remanded. A.R.S. 13-808 does not allow a court to delegate the responsibility to determine the manner of payment to a probation officer. Further, the $8.00 time payment fee is not to be paid to the Judicial Collection Enhancement Fund.

State v. Pierce
87 Ariz. Adv. Rep. 41, May 28, 1991, (Div. 1)

Defendant is charged with sexual abuse of a minor and two counts of sexual conduct with a minor. At trial, both victims testified that the defendant had repeatedly molested them for years. The jury was instructed that they were to consider evidence of other sexual offenses only to the extent they show a propensity for sexual molestation or sexual aberration.

Defendant argues that the jury instruction was erroneous because sexual abuse or sexual conduct with a minor do not necessarily involve elements of sexual aberration. Defendant waived the issue on appeal by failure to object to the jury instruction given. His request for a different jury instruction did not preserve an argument that the trial court's instruction was flawed. No fundamental error occurred because the instruction given correctly reflected Arizona law under State v. McFarlin, 110 Ariz. 225 (1973). Sexual conduct with a minor and sexual abuse of a minor can constitute abnormal sex acts, especially where the victim is defendant's 12-year-old stepdaughter.

The judge instructed the jury that evidence of similar sexual offenses should not be considered for any purpose other than the defendant's state of mind. Defendant argues that it was error to fail to give a jury instruction as to limited use of prior bad acts pursuant to Rule 404(B). The instruction given properly confined the jury's consideration and adequately covered the substance of the prior bad act instruction which the court refused to give. Further, the instruction given kept the jury from considering defendant's prior sexual acts to establish motive, opportunity and other matters that the defendant's proposed instruction would have permitted.

Defendant argues that the trial judge should have required the state to articulate reasons for its preemptory strikes to male panel members of the jury under Batson v. Kentucky, 476 U.S. 79 (1986). The court did not consider whether Batson covers gender questions because defense counsel objected to the state's preemptory challenges only after the jury had been empaneled and the stricken jurors excused. Defendant waived his gender-based objection.

In a special concurrence, one judge notes that in some circumstances the victim's testimony concerning prior sexual acts is mere "bootstrapping".

(cont. on pg. 7)

State v. Ritacca
87 Ariz. Adv. Rep. 67, May 30, 1991 (Div. 2)

Defendant was charged with illegally conducting an enterprise and fraudulent schemes for conducting a Ponzi scheme involving promissory notes. The defendant was not denied equal protection when he was charged with fraud rather than securities violations.

In its case-in-chief, the state introduced appellant's prior felony convictions. A fraudulent scheme can be committed by a material omission. Failure to tell investors of his prior felony record was a material omission, where investors relied upon defendant's claimed background and would not have otherwise invested. The evidence was admissible to prove an element of the offense, a material omission.

During trial, one witness mentions that defendant told him that he had had problems with the I.R.S. The witness's answer did not necessarily imply prior criminal conduct and a mistrial was not required.

Defendant claims he was entitled to a directed verdict where the state failed to prove that the notes were securities. Expert testimony and testimony from a lawyer who advised appellant constituted substantial evidence to deny a motion for judgment of acquittal.

One count of fraud was dismissed before trial. Evidence concerning the two victims of this fraud count was admitted. There was no error because both victims were also named in the illegal enterprise count.

Defendant claims error in admission of bank records which were improperly authenticated. Duplicates of the bank records were properly admitted under the business records exception. There was no question as to the authenticity of the original or any showing that it would be unfair to admit a duplicate.

Defendant claims that his sentence is excessive and that his prior convictions could not be used to enhance as well as aggravate his sentences. There are sufficient aggravating circumstances to support the sentences. The court was not barred from using prior convictions to enhance the sentence under A.R.S. 13-604 and to aggravate the sentence under A.R.S. 13-702.

State v. Superior Court
87 Ariz. Adv. Rep. 51, May 28, 1991 (Div. 1)

Defendant is charged with fraudulent schemes. His wife is called to testify before the grand jury. The defense moves to remand the matter because her testimony violated the marital privilege. The court holds that there is no marital communications privilege for the years the defendant and his spouse were divorced. The marital privilege also protects only those events or communications which are "for or against the target defendant". The defendant's spouse was asked questions at the grand jury proceedings directed at her conduct, not her husband's. Questions about the spouse's conduct which did not imply criminal conduct by the target defendant do not violate the marital privilege.

Count I of the indictment charges the defendant with conspiracy to defraud. Other counts involve the conduct of the defendant's co-conspirators, without any evidence of defendant's direct involvement. Defendant claims that the grand jury could not indict him on these counts without some evidence of his direct participation in the criminal conduct. A conspirator is liable for any offense committed by another conspirator which is a reasonably foreseeable result of the conspiracy. Defendant is liable for the conduct of his co-conspirators if it can be shown that he was in fact a co-conspirator and that his co-conspirator's acts were done within the scope and furtherance of the conspiracy.

State v. Bousley
87 Ariz. Adv. Rep. 11, May 21, 1991 (Div. 1)

Defendant pleads no contest to two counts of armed robbery. The factual basis stated that the defendant simulated a gun in his pocket while robbing two stores. The elements of armed robbery require that a weapon, whether an actual deadly weapon, a dangerous instrument or a simulated deadly weapon, be used. A mere verbal threat to use a non-existent deadly weapon will not suffice. There is no factual basis for the plea.

State v. Gallagher
87 Ariz. Adv. Rep. 44, May 28, 1991 (Div. 1)

Defendant shoots a neighbor's horse which was trespassing on her property. She defends on the basis that the Arizona law allows for the "taking up" of stray animals. The law allows livestock inspectors to take possession of strays. Private individuals have no rights to take possession of strays and "taking up" means to take possession, not to destroy.

Volume 88

State v. Valenti
88 Ariz. Adv. Rep. 3, June 6, 1991 (Div. 1)

Defendant is charged with felony DUI. The trial judge grants a motion to remand the case to the grand jury. The state files a special action, but does not seek a stay. The appellate court sets aside the remand order. Before trial, defendant moves to dismiss on Hinson grounds because the state failed to get a stay. The trial judge grants a dismissal.

The state claims that the remand motion time is excluded under Rule 8.4(b). Time would be excluded if the case had been returned to the grand jury. However, the state did not go back to the grand jury and time was not excluded. However, the time from the filing of the motion to remand until it was granted is excludable.

(cont. on pg. 8)

The state also contends that time is excluded because there were no pending proceedings which needed to be stayed. While time for a special action is excludable, the stay is not automatic. The remand did not stop the speedy trial "clock", and no stay was requested. However, the state did promptly move to set the matter for trial in superior court after the appellate court reversed the remand order. Defendant's decision to seek further appellate review made later time excludable. ^

Arizona Advanced Reporter case summaries are written by Robert W. Doyle and prepared for use by Maricopa County Public Defenders.

VICTIMS' RIGHTS ISSUES

The Victims' Rights Implementation Act (VRIA) was enacted to "[e]nsure that article II, 2.1 of the Arizona Constitution (Victims' Bill of Rights) is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeal". It becomes effective on December 31, 1991*.

The VRIA in many ways elevates alleged victims to the status of parties to a criminal prosecution. Here are some provisions and ideas defense practitioners may want to start thinking about.

Interview Refusals

The most talked about provision in victims' rights has been defense interview refusal rights. The VRIA provides that all contact with victims shall be through the prosecutor. The VRIA does not address what happens when the alleged victim contacts defense counsel.

In a recent aggravated assault case, not covered by the VRIA, Deputy Public Defender Leonard T. Whitfield had a recalcitrant victim. The victim indicated to police at the time of the incident that he did not wish to prosecute (the defendant is his son). The state alleged dangerousness and wanted a plea to a designated felony.

Defense counsel filed a motion to dismiss based on certain promotional language used for Proposition 104 and on an affidavit of nolle prosequi executed by the victim. The trial court denied the motion to dismiss, however, prior to trial the state filed its own motion to dismiss without prejudice. It was granted by the trial court.

Reciprocity

Reciprocity arguments may trigger certain due process protections that can be used to attack the VRIA. The Arizona Rules of Criminal Procedure are based upon reciprocal discovery rights.

In Wardius v. Oregon, 412 U.S. 399, (1973) now departed Justice Thurgood Marshall, **writing for the majority**, reversed the Oregon Supreme Court's approval of a case that struck the defendant's alibi defense. The court reasoned that unless reciprocal discovery rights are given to defendants, due process forbids enforcement of rules requiring defendants to give notice of an alibi defense. Justice Marshall wrote that:

"[W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

Wardius may at least provide federal constitutional support in a variety of situations for interview refusals. Public Defenders in California have routinely tried to prevent further state discovery based on Wardius and the Fifth Amendment.

Waiver

What if the alleged victim gives lengthy press interviews? It is not unusual for victims to talk to reporters and even make television appearances. Since alleged victims now have a constitutional privilege; like all protections it could be waived in certain circumstances.

Commenting on Interview Refusal

The VRIA does not prohibit defense counsel from commenting at trial that an alleged victim refused an interview. However, "[i]f the defendant or the defendant's attorney comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution".

These are just a few areas that the VRIA touches. If you have issues relating to victims' rights, please forward them to me so that we can provide the information to others.

* Amendments to A.R.S. 13-812 and 41-191.06 providing for a $25.00 misdemeanor assessment become effective September 30, 1991. **CJ** ^

JUNE JURY TRIALS

June 03

Robert C. Billar: Client charged with possession of dangerous drug. Trial before Judge D'Angelo ended June 10. Defendant found guilty. Prosecutor A. Fenzel.

Christine M. Funckes: Client charged with 7 counts of child molestation. Trial before Judge Martin ended with a hung jury (7 to 5 guilty). Prosecutor J. Heilman.

(cont. on pg. 9)

Louise Stark: Client charged with theft. Trial before Judge O'Toole ended June 05. Defendant found guilty. Prosecutor S. Sherwin.

June 04

Brad Bransky: Client charged with 2 counts of armed robbery and 1 count of aggravated assault. Trial before Judge Ryan. Defendant found guilty of armed robbery and not guilty of aggravated assault. Prosecutors J. Bernstein and M. Daiza.

Catherine M. Hughes: Client charged with forgery. Trial before Judge Cates ended June 06. Defendant found not guilty. Prosecutor S. Yares.

Kevin M. Van Norman: Client charged with possession of marijuana for sale (between 1-8 lbs.). Trial before Judge Dann. Defendant found not guilty. Prosecutor P. Davidon.

Jeffrey L. Victor: Client charged with burglary. Trial before Judge Hertzberg ended with a hung jury (5 to 7 not guilty). Prosecutor L. Cutler.

June 06

Jerry M. Hernandez: Client charged with aggravated DUI. Trial before Judge Sheldon ended June 10. Defendant found guilty. Prosecutor N. Miller.

June 10

Slade A. Lawson: Client charged with felony DUI. Trial before Judge Sheldon ended June 11. Court entered a judgement of acquittal. Prosecutor J. Walker.

June 13

Robert W. Doyle: Client charged with DUI. Trial before Judge Hall ended June 14. Defendant found guilty. Prosecutor H. Schwartz.

June 17

Brad Bransky: Client charged with possession of narcotic drug and escape. Trial before Judge Ryan. Defendant found guilty of both counts. Prosecutor G. McCormick.

Shelley T. Davis and Randall V. Reece: Client charged with attempted murder, burglary and kidnapping. Trial before Judge D'Angelo ended June 25. Defendant found guilty of all counts. Prosecutor C. Sanders.

James J. Haas: Client charged with possession of narcotic drug and possession of drug paraphernalia. Trial before Judge Riddell ended June 17. Defendant found not guilty. Prosecutor E. Cathcart.

Slade A. Lawson: Client charged with felony DUI. Trial before Judge Grounds ended June 20. Defendant found guilty. Prosecutor J. Walker.

Thomas J. Phalen: Client charged with 2 counts of possession of narcotic drug. Trial before Judge Hall ended June 17. Defendant found guilty. Prosecutor C. Richards.

June 18

Barry J. Handler: Client charged with aggravated assault. Trial before Judge Coulter ended June 20. Defendant found not guilty. Prosecutor B. Bainbridge.

June 19

Peter R. Claussen: Client charged with resisting arrest and aggravated assault. Trial before Judge Cole. Defendant found guilty of resisting arrest and not guilty of aggravated assault. Prosecutor M. Daiza.

Thomas J. Murphy: Client charged with sexual assault, armed robbery and armed burglary while on parole. Trial before Judge Hendrix ended June 27. Defendant found guilty. Prosecutor D. Macias.

June 20

Mark J. Berardoni: Client charged with child molestation. Trial before Judge Seidel ended June 25. Defendant found not guilty. Prosecutor S. Smith.

June 24

Curtis Beckman: Client charged with DUI. Trial before Judge Hall ended June 26. Defendant found guilty. Prosecutor R. Nothwehr.

J. Scott Halverson: Client charged with aggravated DUI. Trial before Judge Sheldon ended June 26. Defendant found guilty. Prosecutor J. Walker.

Elizabeth S. Langford: Client charged with aggravated DUI. Trial was set before Judge Ybarra. Charge dismissed after jury selected. Prosecutor T. Glow.

June 25

Lawrence H. Blieden: Client charged with imitation of controlled substance. Bench trial before Judge Hotham. Defendant found not guilty. Prosecutor H. Williams.

June 26

Roger W. Perry: Client charged with aggravated sexual assault. Trial before Judge Howe ended July 01. Defendant found not guilty. Prosecutor L. Reckart.

June 27

Richard P. Krecker: Client charged with theft, class 3 felony. Trial before Judge Hotham ended July 03. Defendant found guilty. Prosecutor J. Blomo.

TRAINING CALENDAR

August 16

* Maricopa County Public Defender's Office presents "Immigration Consequences for the Criminally Accused" at the Board of Supervisors' Auditorium from 1:30 to 4:30 p.m.

September 7-8

Arizona Attorneys for Criminal Justice presents a Bill of Rights seminar in Tucson.

September 26

Michael Josephson on Ethics presents "Moral Aspirations" at the Sheraton Phoenix from 4:00 to 6:00 p.m.

October 18

* Maricopa County Public Defender's Office presents "Sentencing Alternatives for the 90's".

November 15

* Maricopa County Public Defender's Office presents "Criminal Motion Practice".

* Tentatively scheduled

PERSONNEL PROFILES

Adrienne Arevalo, a new office aide, began summer employment June 24. She replaced Aric Adams in Records and other needed areas.

David J. Bynum came to our office on July 8 as the new Records Manager. David received his Master of Arts Degree in Geography with a minor in Education Administration from the University of Florida. He was previously employed at the University of Florida in Gainesville as the Records Administrator/Program Assistant in the Institute of Food & Agricultural Sciences Fiscal Services Department.

Sherry Pape will start as a secretary in Group D on July 29. Sherry, who comes to our office after employment of ten years with a private water/land company, also has worked for the Glendale Police Department.

Jeffrey Van Norman started summer employment with us on June 24, during the break in his schooling at Whittier College School of Law. After initially assisting the law clerks and pre-trial service officers downtown, Jeffrey transferred to Group C where he performs in the same capacities.

AND ADIEU TO.....

Scott Allen and Mike Smith who left the office and have court contracts...

Bill Brotherton who went into private practice...

Camille Scherb who decided to "practice" in other areas,

Paul Ivy who returned to Oklahoma to take over the family practice...

and

Jim Lagattuta who gave in to wanderlust!

PUBLIC DEFENDER'S OFFICE RUNNER-UP FOR AWARD

Donald L. Vert, Public Defender Administrator, was selected as one of five finalists for the Computerworld Smithsonian Award. Although the office did not win the award at the June 10th ceremony at the Smithsonian Institution in Washington D.C., it was placed second.

The program was founded in 1989 to honor men and women who have achieved outstanding progress for society through the visionary use of information technology. Don Vert received notice in May that he was one of the five finalists in the Government and Non-profit Organizations category.

The award is geared for programs that find ways to use computer technology. Consideration was given to our office based upon the computer tracking system being developed by *Timothy J. Lass*, Project Manager. When fully completed, the office computer system will be a substantial benefit to tracking, filing and retrieving case information.

Additionally, the system may be able to perform analysis on everything from attorney caseloads to court sentencing patterns.

MOCK TRIAL CONDUCTED

Trial Group B held its first full mock trial on July 5. It was a jury trial and included all aspects of a trial except voir dire.

The jury was pulled from several sources: People in the COJET program, friends and relatives of office people, and a few people from this office. They listened to the entire trial and deliberated at the close of the case. The verdict was not guilty.

The participants were Candace Kent and Anna Montoya for the defense, with Jeffrey Victor playing the role of prosecutor for the State. The Judge was Helene Abrams.

All the participants did a superb job presenting their case as well as making it appear to be a real trial. The jury took their job seriously as well.

The trial took place in Judge O'Melia's old courtroom in the East Court Building, 9th floor. The entire trial was video taped.